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Public Land Acquisition *for* HIGHWAY PURPOSES

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Federal Works Agency

Public Land Acquisition for Highway Purposes

By
DAVID R. LEVIN
Transportation Economist
Public Roads Administration

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Public Land Acquisition for Highway Purposes

By DAVID R. LEVIN, *Transportation Economist*
Public Roads Administration

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SUMMARY AND CONCLUSIONS

There are many focal points of weakness in the present machinery for land acquisition for highway purposes in the United States. While the laws and procedure in some States are models of excellence, policies and practices in most States can be improved materially. The construction of new facilities and the modernization of existing highways are being delayed, sometimes indefinitely, because of prohibitive land-acquisition costs. The diversity of land-acquisition methods, most of them time consuming and expensive, is a primary obstacle. Many States still permit the burden of acquisition and financing of State highway rights-of-way to rest with local units of government despite ineffective administration and financial incapacity. Tolerance of these practices has impeded the early

realization of the benefits of needed public improvements. Tedious delays increase costs already burdensome, while untrained personnel are helpless to meet the challenge of new requirements. While population centers are growing rapidly today, the law and the courts, unfortunately, move very slowly indeed. This delay in action limits the power of State and local governments.

In a word, public authorities in many of the States cannot obtain land for highway facilities when they need it most; when they do finally acquire such lands, it is found they do not have enough, and that too much has been paid for what they do have. As a result, the functional obsolescence now characteristic of land-acquisition policy threatens to warp the growth of a highway system which might otherwise enjoy a wholesome development. Properly planned and implemented with efficient land acquisition machinery, a highway facility can supply a needed transportation medium, sharply increase adjacent land values, reduce commuting time to urban centers, and result in a low cost for a good transportation service. Improperly planned and hindered by a multiplicity of legal, financial, and administrative obstacles, a highway becomes a magnet for slum development, billboards, roadside stands of all sorts, decadent land values, and traffic congestion with its attendant human and economic toll; at the same time, it results in a high cost for a poor transportation service.

The problem is not so much one of devising an entirely new technique as it is of revising the existing mechanism and reassembling the parts to do a given job more effectively. There is no "best" method of right-of-way acquisition. Practice will vary with needs and circumstances. But if land-acquisition policy is to be efficient in implementing the creation and modernization of our highway system, it must facilitate land assembly at the minimum total cost with the maximum of speed consistent with the preservation of the rights of private property. To this end, the following recommendations are suggested:

(1) A single, efficient method, preferably what has been referred to as the administrative type, of acquiring lands for highway facilities or for all public purposes can effectively be substituted for the many cumbersome procedures now in use. There is nothing inherent in the nature of the units exercising the power of eminent domain or in the public uses for which lands are acquired that requires individual treatment.

(2) To make possible the successful transformation of a projected public improvement into the finished product, it is suggested that the right of entry to make locations and surveys be written into the State statutes.

(3) After certain preliminaries have been complied with, and pending the settlement of negotiations, the right of immediate entry and possession of lands is necessary to expedite the timely construction of highways and should be granted by law, with adequate safeguards for the protection of the property owner.

(4) A centralized land-acquisition division should be created in every State highway department, equipped with adequate records and staffed with trained personnel selected by the merit system. A consistent policy should prevail, utilizing prenegotiation appraisals, options, standard values, research, summary court procedure, and all the other techniques which experience has demonstrated result in greater returns per unit of expenditure.

(5) The magnitude of the present expenditures and the time consumed in title searching and title examination in the transfer of property acquired for highway facilities (as well as for other public purposes) warrant a careful consideration of the merits of the effective and widespread adoption of the Torrens system of land registration in the various States.

(6) Since the judicial condemnation mechanism used in most of the States today is cumbersome and costly, revision of forcible acquisition should be modeled after the summary and effective administrative Court-of-Claims procedure utilized under the New York Grade Crossing Elimination Act. A single condemnation tribunal is most desirable.

(7) Present land acquisition laws should be revised to the end that all court acquisition proceedings be given a genuine preference over all other civil actions in the setting of times for hearing and trial, so that all such actions may be heard and determined quickly. At the same time, means could be devised to make such a preference effective in practice.

(8) In the interests of economy and dispatch, group condemnation should be sanctioned by law and used effectively in the acquisition of lands for highway facilities. Moreover, it is essential to the public interest that when the need arises, the condemner of lands be permitted to abandon condemnation proceedings except when a property is deemed already to have been taken.

(9) It is desirable to sanction friendly, noncontested, summary court proceedings in unusual cases and to cure defective titles to property which is acquired for public purposes.

(10) All States should permit special benefits to property arising from public improvements to be offset at least against consequential damages. While some State statutes permit special benefits to be so offset, in actual practice it is rare that benefits of any kind are

taken into account in the determination of just compensation. The sound public policy which is thus written into the law ought to be reflected in its application in practice.

(11) Since the obvious financial incapacity of local units and of some States is becoming more and more of an obstacle in the provision of adequate highway facilities, the States and the Federal Government may find it necessary to finance acquisition of land for projects in which they participate.

(12) The device of marginal land acquisition, popularly identified as "excess condemnation" should be legally sanctioned in all the States; it is used but sparingly in those jurisdictions in which it is permitted, despite its potential usefulness.

(13) Where devices such as marginal land acquisition are not utilized, land use controls, i. e., zoning and platting and subdivision regulation, will be useful in producing a more efficient highway transportation system.

(14) Despite the apparent usefulness of the limited-access highway, its potentialities are still largely unexplored. Early and widespread utilization of this type of motorway in areas of high traffic density will pay untold dividends in safer and more efficient travel.

INTRODUCTION

Present public-acquisition policy for highway rights-of-way seems to have paralyzed current efforts to obtain the most efficient expenditure of public funds for transportation facilities. Close examination of the legal, financial, and administrative machinery by means of which lands are acquired for highways reveals striking inefficiency and obsolescence.

The continued existence and use of outmoded land-acquisition practices cannot be condoned but it is easy to understand how this aggravated condition came to exist. Along with the transfer of local highways to the State highway departments, the States fell heir to the already ancient laws dealing with right-of-way acquisition.[1] The State laws and practices of appropriation of lands for public purposes represented the accumulations of more than a century and, except in isolated instances, little revision or simplification has been attempted. There is much wisdom in periodic revision of the rules of policy and procedure, lest the substance be lost in a maze of arbitrary and confusing laws.

For some time, there has been agitation for reform of the mechanism by which the various States and their political subdivisions forcibly acquire lands for highway facilities. Reform is necessary because

[1] Expropriated Rights of Way, by L. E. Boykin, American Highways, April 1941, vol. XX, No. 2, p. 3.

inherent obstacles impede the modernization of the transport structure built up and maintained in recent years. Accordingly, the Public Roads Administration has directed its attention toward the investigation and elimination of highway land-acquisition difficulties which in the aggregate constitute the so-called right-of-way problem. It is the purpose of this bulletin to outline some of the criteria of an effective public-land acquisition policy, to indicate generally to what extent present State practices conform with these standards, and to suggest general principles as a guide to the removal of the obstacles inherent in present technique.

A SINGLE, EFFICIENT METHOD OF ACQUIRING LANDS FOR HIGHWAY FACILITIES

One of the chief weaknesses of present right-of-way acquisition practice is the variety of methods, voluntary and compulsory, of acquiring land. There are 320 methods of condemnation in 55 jurisdictions.[2] Pennsylvania has 46 different methods for the forcible acquisition of lands, Nebraska 15, Missouri 13, and so on down the line. Separate methods are provided for the various political subdivisions of a given State, different methods for the numerous agencies within each such unit, and still others for various public uses. There is nothing inherent in the nature of the units exercising the power of eminent domain, nor in the uses for which lands are acquired, that requires individual methods of right-of-way acquisition.

Michigan, faced with the situation which confronts many jurisdictions today, has recently indicated an intelligent solution to the problem. State authorities in 1929 desired to acquire a portion of a railroad right-of-way to facilitate the widening of a trunk-line highway. The State highway commissioner was to enter into agreement with the railroad company to exchange other designated property for such right-of-way. The designated property could be acquired only by condemnation. But neither the State highway commissioner nor the legislature itself was sure what the proper method was. Confused, the legislature set up a new method, and thus another procedure of forcible acquisition was added to the 18 already in existence. After thorough study of the problem, a single, uniform method is being contemplated as a substitute for the existing, cumbersome methods.

The land-acquisition machinery designated by law in each State has either a judicial or an administrative approach to the problem. The latter system of land acquisition is the more recent and is the more summary procedure.

[2] Condemnation Procedure, by R. R. Ray, First Report of the Judicial Council of Michigan, 1931, p. 27.

Under the judicial approach to public-land acquisition, after necessary preliminaries have been complied with, the condemner seeks to purchase a property through negotiation; if the power of eminent domain must be resorted to, the condemner invokes formal legal machinery by service of a petition upon the owner of the condemned property, the court after hearing the evidence determines with or without a jury what the just compensation for the property shall be, and title passes after the award has been paid the owner unless by statute it passes upon grant of possession and right of entry. Under the administrative approach, after certain preliminaries, the condemner files a plat and description of the property, and after notice to the owner of such action, the appropriation becomes complete and title to the property vests in the State; if formal offers of the condemner are rejected, the owner must file with the State Court of Claims a demand for the value of his property taken or damaged. After hearing all the evidence, the court will make an award.

It is recognized that just compensation for the taking of private property must be made in all cases and that, in so doing, due process of law must prevail. A single uniform method, preferably of the administrative type, for the acquisition of all lands for public purposes can be substituted effectively for many cumbersome proced res now followed.

RIGHT OF ENTRY TO MAKE LOCATIONS AND SURVEYS

To make possible the successful transformation of a projected public improvement into the finished product, it is necessary that public authorities have the right to enter private property for the purpose of making essential locations and surveys without becoming liable for the consequences of legal trespass. While the courts in some States have construed this right to be implied from the express grant of authority to make provision for designated public improvements, it is highly desirable to have this right expressly indicated in the statutes, with such safeguards as are deemed necessary to protect the property owner adequately. The condemner certainly needs to know precisely what lands may be best adapted to the authorized improvement and what portions of the affected properties will be required; the comparative advantages and disadvantages of various locations must be ascertained if maximum benefit is to result from the expenditure of public funds.

The majority of States make no express provision for such a right of survey entry. The few jurisdictions which have granted the right by law specify that the entry and survey must be made "in the manner which will be compatible with the greatest public benefit and the least

private injury, and that the petitioner will become liable for any injuries which are the result of negligence, wantonness or malice."[3] These are adequate safeguards.

THE RIGHT OF IMMEDIATE ENTRY AND POSSESSION OF LANDS

Much of the delay and accompanying expense found in land-acquisition processes is attributable to the absence of legal right to enter and take possession of desired premises after certain preliminary negotiations have been completed. In many States, a condemner cannot enter into possession of or commence construction of an improvement until compensation has been determined and paid the property owner. This results in hardship both to the condemner, because he cannot proceed with the improvement, and to the public, because it is deprived of the use of the improvement.

A classical illustration of the lapse of time between the commencement of condemnation proceedings and the start of construction operations was given in the case of the widening of Woodward Avenue, in Detroit, Michigan. The death of a juror invalidated the whole procedure and caused a delay of almost a year and a half. A new trial had to be instituted. The case cost the city of Detroit $100,000 and the public was deprived of the immeasurable benefits which would have resulted from the early realization of a needed improvement.

Delays of 2, 3, and even 4 years are not uncommon. Such factors as the requirement of a cumbersome jury and a unanimous verdict, indiscriminate adjournments, lack of supervision by the court, and jury determination of necessity may contribute to delay in condemnation proceedings, whereas provision for entry and possession pending action would facilitate the immediate realization of the benefits of improvements.

The owner of property must be protected in some fashion, however, if the condemner is given the right of immediate entry and possession pending determination of just compensation. Utah makes adequate provision by statute, indicating that the condemner may petition the court for the right of immediate entry and possession, after necessity has been established and notice given the owner. The court then takes testimony as to the value of the premises and the reasons justifying immediate occupation by the condemner. If possession is permitted, a bond for double the value of the land and damages must be executed in favor of the property owner, and the

[3] See laws of Arizona, California, Montana, North Dakota, Utah, Idaho, Nevada, and New Mexico.

condemner may then proceed with the improvement. While even this practice may be improved upon, perhaps, it indicates the direction which revision ought to take.

Possession is sanctioned pending an appeal in condemnation proceedings, in most jurisdictions. There is every reason for permitting immediate entry and possession at the commencement of attempts to acquire land, since a property owner can be as securely protected at the beginning of proceedings as later.

A CENTRALIZED STATE LAND ACQUISITION AGENCY

One of the most promising steps toward the immediate solution of the right-of-way problem is the establishment of an efficient, centralized land-acquisition division in each State highway department. In practically all States, the local units of government continue to acquire rights-of-way for a highway system which has rendered the local units obsolete in this field.

Close examination of present land-acquisition practices, notably with reference to State highways, reveals countless weaknesses. The complete absence of organized records, even of the simplest kind, indicating past or present transactions involving right-of-way acquisition is most amazing. Where any records at all are available, they are scattered among various offices, official and unofficial, in the same city, and sometimes in different cities. Moreover, highway development in most counties is not extensive enough to warrant the creation of a separate right-of-way department, with trained personnel in each county unit. Solution of the problem lies in the creation of an efficient, centralized land-acquisition organization, with adequate records and trained personnel, utilizing consistent policy, base prices, prenegotiation appraisals, photographs, options, summary court procedure and all the other techniques which experience has demonstrated result in greater returns per unit of expenditure.

Let us examine some of the characteristics of an efficient, centralized land-acquisition organization:

Skilled Personnel.—Experience indicates that the acquisition of lands for public highways is a rather complex undertaking today, requiring trained and expert personnel. Engineers are required to understand the physical aspects of right-of-way acquisition. Specially trained agents are needed to negotiate with property owners for their lands. Lawyers are needed to prepare and execute the legal instruments, investigate titles, clear encumbrances, and represent the public interest in condemnation cases. Experts will make prenegotiation appraisals, appear as expert witnesses in court proceedings, and establish base values. Perhaps a photographer will take pictures of a property to facilitate negotiation and possible

forcible acquisition. An excellent illustration of the advantages of skilled personnel is found in the acquisition activities of the New York State grade crossing elimination program in which early and consistent provision has been made for trained workers with specialized skills, employed on a full-time basis. It has been demonstrated time and again that the costs of maintaining trained men are repaid tenfold by ultimate savings in total acquisition costs.

Adequate Land-acquisition Records.—It is elementary that an adequate system of records and accounts is essential to the ultimate success of any enterprise, whether public or private. Particularly is such a system necessary when government undertakings are involved, in order to enforce responsibility, facilitate accountability, and measure efficiency. Only in this way can maximum benefit be derived from the expenditure of public funds.

The absolute minima in land-acquisition records should include an adequate land-acquisition subsidiary ledger, a parcel "case history" record, a progress report record, a standardized appraisal report form, as well as a compehensive filing system for every legal document, letter, record, and written statement concerning a given highway development, retained in one centralized office, classified according to highway number, and subclassified by consecutive parcels and subject matter. The purpose of the land-acquisition ledger is to bring together, in one subsidiary record, all essential financial information relating to every individual parcel of a given highway or flight-strip project. The parcel "case history" record will reveal the status of each individual acquisition at a moment's inspection, in terms of the principal steps necessary to consummate the acquisition of a parcel. The purpose of the progress report record is to indicate to State and Federal authorities how rapidly land acquisition for a given project is proceeding. The standard appraisal form will facilitate uniform reporting of investigations by State and special appraisers as well as interpretation of their findings. The benefits of an organized filing system for all papers and documents relating to land acquisition include easy accessibility to such records, and efficient operation of acquisition machinery.

There is a dearth of organized land-acquisition records and standard forms in the States and local units, despite their superiority over haphazard records and techniques. A good illustration of the type of record keeping that is desirable for right-of-way acquisition is found in the Grade Crossing Bureau of New York. Although the system devised is not perfect in every respect, it does indicate what the principal features should be. The system of centralized records consists of a series of folders containing all information pertaining to each project, and to each parcel within such project, filed under a

special Public Service Commission number. Each folder contains a map of the entire project, plat maps for each parcel, engineers' estimates of land and damage costs, reports of physical inspection of the property, copies of formal notices, photographs of the properties, copies of agreements, court-of-claim proceedings, as well as correspondence and memoranda concerning all transactions. Included also are memoranda indicating the basis of settlement, in terms of land costs, and the various elements of damages. Out-of-pocket expenditures for incidental services, such as witness fees, etc., are shown only to a limited extent.

Standard Right-of-way Parcel Plats and Strip Maps.—Logic and experience both indicate that maps and plats are indispensable in the construction of highway transport facilities. Both the highway engineer and the highway planner now realize that accurate and complete maps and plats facilitate the efficient providing of roads and streets. Such maps are visual shorthand; they are singularly effective in etching on the mind complex physical patterns, both natural and man-made.

Right-of-way parcel plats and strip maps have been traditionally used by the States and the local units of government in the acquisition of lands for highway purposes. They serve many useful functions. The statutes of many States provide that the filing of parcel plats and legal descriptions with designated recording officers shall be a condition precedent to the transfer of title to private property required for highway purposes. Moreover, if property cannot be acquired through negotiation and must be condemned in court proceedings, the making of such plats and maps is a necessary first step in the action; they are also invaluable to appraisers, jurors, judges, attorneys, engineers, and others in eminent domain cases. In addition, parcel plats aid appraisers and negotiators immeasurably in acquisition activities and constantly prove their worth as aids in the consummation of settlements with owners at reasonable values. Then too, maps and plats are indispensable for highway planning and engineering purposes, and form a necessary part of the complete land-acquisition office file for each parcel acquired and project undertaken.

Many right-of-way plats and land-acquisition strip maps of some States and local units are strikingly inadequate and devoid of any semblance of uniformity or standardization. In contrast, other States have designed plats that serve as models of excellence. There appears to be as much variation in presentation, even in essential respects, as there are units of government. Some States do not utilize the strip map at all despite its potential usefulness in land-acquisition activities. Right-of-way parcel plats vary in size from 3 by 10 feet to 4 by 11 inches; some are unwieldy and impractical to work with while others

lend themselves to easy use. Some plats barely indicate the highway improvement and adjacent lands, and do not designate structures and improvements damaged or affected. Such designation seems to be indispensable to an intelligent valuation of property acquired for highway purposes and in right-of-way negotiations in general. Examples of deficiencies in plats and maps can be multiplied indefinitely.

There is urgent need, therefore, for relatively uniform, standardized right-of-way parcel plats and land-acquisition strip maps, to the end that the land-acquisition activities of the Federal, State, and local governments for highway purposes may be carried on with maximum efficiency. It is desirable for the State or local highway department to prepare two types of plats or maps, a so-called strip map and individual parcel plats. A single strip map for an entire highway project will indicate in a general way the relationship of each parcel to the projected highway improvement; it will also include information concerning the ownership of areas to be acquired, by individual parcels, as well as the general detail of location, dimensions, and so on. In addition to strip maps, individual right-of-way plats of uniform and convenient size should be prepared for each parcel to be acquired. The plats should show parcel dimensions, all structures and improvements, the right-of-way to be taken, immediately adjacent tracts, lines, bearings, distances, and all other related information. These strip maps and parcel plats make highway land acquisition more effective in the furnishing of transport facilities.

Prenegotiation Appraisals.—In order to place the appraisal technique in its proper setting in relation to the acquisition process generally, prenegotiation appraisals and condemnation appraisals must be distinguished. A prenegotiation appraisal is a scientific determination of the value of a given parcel, in terms of land, improvements, and consequential damages, precedent to actual negotiations with the property owner. Its purpose is to provide the basis for an intelligent and fair settlement with the owner. A condemnation appraisal is such a determination after negotiations have broken down and court proceedings are under way. Its purpose is to justify the State's or the county's assertion of a given value for a parcel.

Since appraisals which precede the purchase of land will determine negotiating prices and serve to condition voluntary settlements, they are most important. Prenegotiation appraisals should be based upon thorough knowledge of local values and trends and upon experience in public land assembly. Such appraisals must not be predicated upon free market values, for the purchaser is known in advance and cannot readily substitute one property for another. When a highway is projected, every parcel within certain established lines, with

minor exceptions, must be acquired, and neither purchaser nor seller is free, in the sense of being a willing buyer or a willing seller. The government needs designated land, and if it cannot purchase a parcel through negotiations, it will resort to its power of eminent domain. Assuming that a property is taken for a public purpose, the owner must eventually part with the land, and if he will not negotiate for its sale, condemnation will force his hand. In other words, in public land assembly for highways, as for other public uses, peculiar conditions govern price, conditions which do not normally prevail on the open market. These special conditions in the aggregate are reflected in what is sometimes labeled plottage or assemblage costs. If the most efficient practices are followed, assemblage costs are at a minimum.

Examination of the present appraisal practices in the States brings much to light that can be improved. Few of the many local units use the prenegotiation appraisal device. Generally, only the condemnation appraisal is utilized, and only when its use is essential to the successful prosecution of eminent domain proceedings. Under the procedure generally used, an owner is likely to be well paid for his efforts in bargaining.

It appears that the valuation approach of some jurisdictions is basically unsound. If only a few of the local units utilize the prenegotiation appraisal, it is to be expected that some property owners will be recalcitrant and compel the county to condemn their properties. Force of logic indicates that court proceedings, necessitating the use of a condemnation appraisal, might well be the only basis upon which an intelligent and fair award can be made. It is not at all unlikely that the number of condemnation suits could be materially reduced through the more extensive as well as intensive use of the prenegotiation appraisal. No brief is held for either condemner or property owner and it is true, no doubt, that some owners demand exorbitant prices. But it seems that the county authorities are "putting the cart before the horse" when they attempt to purchase property without first making an impartial and scientific appraisal, waiting until they get into court to ascertain for the first time what, in all fairness, they ought to pay the owner for his property.

Base Values.—Base values may be used to advantage in the determination of the award to be paid a given owner for his property taken for a public purpose. Base values are purchase prices set by public authorities for all bare or "raw" land and certain improvements such as fencing and trees that can be reduced to a unit-of-value measurement. Except in special cases, authorities will deviate but little from these values in bargaining with owners of property. For

example, the right-of-way department may determine that agricultural pasture lands in Albany County are worth $75 an acre and that ordinary fencing is worth one dollar a rod and bargain accordingly with property owners when land is desired for highway purposes. The discriminate use of the device has resulted in relatively low acquisition costs.

Options.—The option is another useful device which facilitates acquisition of lands. The Metropolitan Water District of Southern California has found the option of great value in its Colorado River project, in its acquisition of rights-of-way and easements for roads, tunnels, etc. This instrument, upon a small payment, grants the District the right to purchase, within 30 to 90 days, described lands, permitting the making of whatever changes in location are necessary without considerable loss. The option, in this case, designates the title company making the original report as escrow agent; by its terms, the option becomes a binding agreement for sale and purchase, permitting immediate possession upon notice, thus obviating much delay that would otherwise result. It is used by other large land acquisition agencies in various forms.

Photographs.—The use of photographs of the individual parcels of property in negotiations with the owner and in condemnation cases is to be highly encouraged, particularly where immediate possession is the practice. What a person sees is many times more effective than what he hears. The National Association of Real Estate Boards conducted a survey several years ago which indicated that 87 percent of a sale was effected through the eye, 7 percent through the ear, and the remainder through the other senses. Even in negotiation with the property owner, there is sometimes a dispute as to the exact condition of the premises before a given improvement was commenced; a photograph may settle the controversy conclusively. It goes without saying that the most effective way of presenting testimony in court proceedings is by visual aids, by means of photographs, maps, charts, and so on. The majority of efficient right-of-way organizations use this device.

Research.—For a long time, many individuals conversant with the problems of highway land acquisition and ranging from design engineers to legal counsel who represent the public in condemnation cases, have felt the need for evidence to substantiate allegations of the inadequacy and obsolescence of existing facilities and the need for highway modernization. A division of the centralized right-of-way department in each State might well devote its energies to research along these and other economic lines, guided perhaps by a Federal agency such as the Public Roads Administration.

Many condemnation cases have been "lost" because counsel lacked sufficient evidence to establish their cases. Even appellate courts have indicated that acquisition devices which might well be recognized as contributing to the public welfare have not been sustained in court largely because of inadequate presentation. It is common knowledge that 90 percent of lawsuits are won or lost in their preparation. Certainly, there is urgent need for an adequate assemblage and interpretation of all the facts on right-of-way acquisition practices and procedures, in the same fashion that the State-wide highway planning surveys, under guidance of the Public Roads Administration, have undertaken the assemblage of all the physical data of our highway system. Only then can there be possible an intelligent solution to the right-of-way problem.

Miscellaneous.—There are many other devices that a right-of-way department can utilize to promote the efficiency of public land acquisition. Public replacements of driveways, steps, and similar improvements might well be undertaken either by highway department work crews or by private individuals after competitive bidding, in lieu of payment of damages. Experience has indicated that this will result in substantial economies. Moreover, cooperation between the centralized right-of-way department and local authorities is essential to successful land assemblage, for efficient negotiation requires a knowledge of local properties and local personalities. Right-of-way acquisition activities should be coordinated with land-use patterns, to reduce acquisition costs, enhance property values, and create a better land-use pattern.[4]

Legal descriptions of land should be clear and simple and no more detailed than is necessary for satisfactory identification of the parcel. The present practice in most jurisdictions is quite otherwise. Reasonable negotiations should be the governing rule, but prompt forcible acquisition is most effective when settlement is otherwise impossible. A consistent though not inflexible policy should always be maintained.

The merits and costs of widening an existing route should be carefully investigated and compared with those of locating a new route,

[4] To illustrate: Easterly from Los Angeles, California, at the intersection of State Highway Route 26 and Valley Boulevard, two miles east of El Monte, there was in 1932 a 35-acre walnut grove advertised for sale at $500 an acre. The improvement of Route 26 traversed this property, requiring an area for separation of grade with that of the main line of the Southern Pacific Railroad Company; damages to the remainder of the property, due to the resulting change in grade and severance of the lands, was considerable. As a result of efforts of the right-of-way department, the owner settled for a total compensation of $50 for each walnut tree damaged. The land-use pattern of the property was altered in line with the highway improvement; the property was subdivided in such a fashion that the change in grade was not detrimental, and some commercial areas were designated and sold. The owner has disposed of the property at substantially seven times the price he originally asked. *See* Acquisition of Rights of Way for Public Use and When and Where Donations Should Be Expected, by S. V. Cortelyou, Right of Way Procedure and Land Acquisition, 1936, American Right of Way Association.

before recommendations are made. Moreover, preliminary cost surveys by competent appraisers are just as important as preliminary engineering surveys by engineers, and the results of both should be correlated before a given improvement is projected.

It has been suggested too that courts should be given more adequate control over juries in condemnation cases, confining jury activities to a determination of the facts in the case, rather than permitting them to be judges of the law as well. In isolated cases, it is sometimes advantageous to defer the determination of damages until completion of construction, if no special facts indicate that doing so will be unjust or work hardship. This is particularly desirable where special consequential damages are involved, as it may not be possible to foresee the extent of the damage until after the improvement is completed. The suggested practice will result in neither overpayment nor underpayment.

TITLE SEARCHES AND EXAMINATIONS

The necessity for an adequate system of land registration is apparent in view of our large population and the great dispersion of property ownership. Yet the systems of title searching and title examination utilized in the transfer of property in many States are cumbersome and expensive.

Under the Torrens system of land registration, originated in 1857 by Sir Robert Torrens in South Australia, all deeds and documents affecting property are registered. A single certificate is issued indicating who the owner is and what encumbrances exist on a given piece of property. This contributes to the easy determination of title and greatly diminishes the delays and expense of title abstract extensions and title searches incident to ministerial or judicial transfers of land. There is no need for expensive and elaborate title searches. Recent investigation of several hundred acquisitions in the grade-crossing elimination program in New York reveals that the cost of title searches ranged from $9 to $293 per parcel, the average being approximately $45.

Nineteen States have sanctioned the use of the Torrens system, but its use is largely permissive. Cook County is the only place where the plan has been adopted in the State of Illinois.[5]

California's registration act permits any land owner, for a fee, to petition the superior court in the county where his property is situated, to order the registrar of titles to file a certificate of title in the register, indicating the applicant to be the owner of designated prop-

[5] Any county in the State desiring to institute the system must first present a petition, signed by half the registered voters, to hold an election on the issue; two-thirds majority is required to adopt the system.

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erty subject to such encumbrances as may exist.[6] The advantages of a widespread use of the Torrens system of land registration are apparent.

COURT PROCEEDINGS

Property owners may be classified in three categories characteristic of their reaction to the public acquisition of their property: (1) A relatively small group of owners who are truly public-spirited and will gladly dedicate their property to a public use, for little or no compensation; (2) a large group of owners who, after some negotiation, will settle with public authorities for values approaching fair market values; some of this group will react favorably under the threat of condemnation; (3) a relatively small but insistent group of owners, who refuse to settle at values even in excess of fair values, and demand exorbitant prices for their properties; it is this class of individuals who are most troublesome and have done much to impede sorely needed improvements. In addition, isolated parcels must be acquired through court proceedings because of technical legal obstacles to a negotiated settlement.[7]

Lands for highway facilities that cannot be secured through negotiation and purchase must be acquired forcibly through court proceedings. The acquisition process as a whole is cumbersome, costly, and inefficient, particularly the judicial condemnation mechanism.

To illustrate: The Westchester County Park Commission desired about five acres of Mrs. X's farm for the Bronx Parkway Extension. Three appraisers valued the property at $1,742, $1,314, and $2,080, respectively, all of which were in excess of the current market values of similar property. The Commission offered Mrs. X $2,570 for the 5.14 acres it required, ordinary unimproved farm land with little damage to result from the proposed parkway improvement. Two years later, the attorneys for Mrs. X protested to the Governor concerning the unnecessary delay and expense, indicating that thus far the condemnation commission had held 40 meetings of which about half consisted of merely meeting and adjourning; each of the three members received $25 per day for each of these sessions. Finally, after almost four years of negotiation and litigation, Mrs. X received an award of $8,368, and the total additional out-of-pocket expense of the condemnation proceedings to the State was $8,964.

[6] All documents concerning registered land are filed with the registrar of titles and, upon payment of necessary fees, are listed on the certificate. Documents transferring title to land must be signed by the transferee and accompanied by the certificate of title before they are accepted by the registration office. The title certificate is issued by the registrar of the county and is insured by the State assurance fund. *See* Torrens Titles and Their Effects on Acquisition of Rights of Way, by R. C. Tilton, Right of Way Procedure and Land Acquisition, 1936, American Right of Way Association.

[7] Where infirmities in the title exist or where property dedicated to a public use is desired for highway purposes.

Drastic revision of land-acquisition processes seems indicated and revision probably should be modeled after the administrative court-of-claims procedure. The direction which such redesign of the court acquisition machinery ought to take is dealt with in terms of the following elements.

A Single Tribunal for Condemnation Cases—Court of General Original Jurisdiction.—There is an unwarranted diversity in the number and type of tribunals designated to hear condemnation suits, varying not only from State to State, but also within a particular jurisdiction. There are 36 different tribunals in the various States having jurisdiction in condemnation proceedings, ranging from the lowest ranking tribunal to the highest.[8] There are some States in which every different method of acquiring land provides for a different tribunal. An explanation of this phenomenon can perhaps be found in the manner in which the power of eminent domain has developed through the years. Every new grant of power to a public or quasi-public body, for a new public purpose, designated a new method and quite often a new tribunal for the determination of the rights of litigants. Neither the character of the condemner nor the purpose for which property is taken justifies any such diversity as exists. There should be but a single, efficient tribunal. Testimony supporting this thesis may be found in the 19 jurisdictions which utilize a single tribunal.[9]

There is also great diversity among the States as to the size of the tribunal, the qualifications and basis of selection of its members, the functions of the body, the time for submitting the report, and the compensation the members receive for their services. The size of the body varies from 1 to 12. Seventy-three methods of public land acquisition in 25 States require a jury of 12, whereas 135 methods in 37 States fix the size of the tribunal at 3. Due process of law does not necessarily require a jury assessment of damages in those States which have no specific constitutional provision requiring a jury trial in such cases. A jury is much too large and cumbersome a body to dispose of condemnation cases efficiently, for valuable time, often as much as 2 weeks or more, is lost in impaneling the

[8] These include the circuit court, district court, superior court, court of common pleas, supreme judicial court, probate court, county court, justice of the supreme court, justice of the peace, circuit court commissioner, corporation court, associate judge, court of general sessions, court of quarter sessions, recorder's court, insolvency court, ordinary of court, police jury, any court of record, levy court, sheriff, governor, public service commission, road commission, commissioner of highways, director of State highways, State highway department, county commissioners, county supervisors, board of public works, selectmen of town, township trustees, town superintendent, city council, town council, common council of city and municipal officers.

[9] Included are Alaska, Arizona, California, Canal Zone, Connecticut, District of Columbia, Florida, Idaho, Kentucky, Montana, New Mexico, North Dakota, Oregon, Philippine Islands, Puerto Rico, Texas, Utah, Washington, and Wyoming.

jury, and its deliberations also require too much time. Moreover, it is difficult for 12 nonexperts to agree upon a verdict; this is most significant when a unanimous verdict is required. In the meantime, burdensome expenses are continuing. To put it simply, it seems unwise to require 12 persons to do a job which 3 persons or even 1 person can do more efficiently. Protection of the property owner allegedly accorded by a jury trial can be obtained more effectively by a smaller body.

Public land-acquisition requirements have assumed such importance today that adjudication of disputes can no longer be entrusted to an inferior court such as a probate court, recorder's court or a justice of the peace. It seems incongruous that determination of claims frequently amounting to thousands of dollars is permitted to be made by tribunals which otherwise are limited in their jurisdiction to cases involving several hundred dollars. It is absurd that in Detroit, Michigan, cases involving hundreds of thousands of dollars were tried in the recorder's court, a court of criminal jurisdiction! The tribunal that should be entrusted exclusively with litigation arising out of public land acquisition is the court of general original jurisdiction as is the practice in 17 jurisdictions.[10]

Preference of Condemnation Cases on the Court Calender.—A combination of circumstances makes it highly desirable for condemnation suits to be given priority on the civil court calendar. At the time most of our condemnation laws were enacted, decades ago, eminent domain was seldom resorted to, public improvements were few in number, and amounts involved were negligible. Today, the situation is much changed. Public improvements are many and are sorely needed; eminent domain is invoked relatively often; awards frequently amount to thousands of dollars in an individual case; and court dockets are congested. In this setting, condemnation cases have been given minor consideration and every dilatory tactic known to the legal profession has been permitted.

Few States have made any provision for granting priority to condemnation disputes, or for expediting their adjudication. California is perhaps the model, in providing that all forcible acquisition proceedings are to be given preference over all other civil actions in setting times for hearing and trial, so that all such actions may be quickly heard and determined. The wisdom of and need for such a provision cannot be challenged. At the same time, means should be devised to make such a preference effective in practice.

[10] Alaska, Arizona, California, Canal Zone, Connecticut, District of Columbia, Florida, Idaho, Montana, New Mexico, North Dakota, Oregon, Philippine Islands, Puerto Rico, Utah, Washington, and Wyoming.

Group Court Proceedings.—In the interests of economy and efficiency, group condemnation ought to be sanctioned by law and used effectively in the acquisition of lands for highway facilities. Group condemnation is the prosecution of eminent domain proceedings against a number of separate parcels or owners in a single suit. Duplication of effort is avoided by the utilization of a single set of experts and witnesses, by the grouping of trial dates, by the consolidation of legal documents, and in many other minor respects, which, though insignificant in themselves, constitute substantial contributions to over-all economy. Occasional allegations that group condemnation constitutes an infringement of the rights of private property are without foundation.

Some courts, in the absence of express constitutional or statutory sanctions, have permitted group condemnation, while others have denied its use. Statutory provision would dispel the uncertainty as to the use of the device existing in many States today.

An illustration will indicate the desirability and practical application of group condemnation in a large metropolitan center. In the proposed improvement of Olympic Boulevard, Los Angeles, California, 22,000 parcels of property were involved. Of these, 605 parcels were involved in condemnation proceedings commenced in November 1926. There were approximately 1,500 separate parties defendant to the action, of whom about 100 had to be served with process by publication; in 40 to 50 cases, estates had to be probated. The trials actually began in November 1929. Approximately 500 cases were heard before a board of referees appointed by the court, and the remaining 100 were tried by a court and jury. Some property owners contended that they were entitled to separate trials, but the court ruled that it was a matter of discretion of the court to determine whether group condemnation was permissible, and overruled the owners' pleas. The trials were completed in July 1930, and all appeals were settled by June 1931, the awards, exclusive of legal and incidental expenses aggregating more than 12 million dollars. The additional legal and incidental expenses which would have resulted had each owner been granted a separate trial, not to speak of the unwarranted delay, would have been overpowering.[11]

Abandonment of Condemnation Proceedings.—It is essential to the public interest that, when the need arises, public agencies be permitted to abandon condemnation proceedings except when the prop-

[11] The project was entirely abandoned later because of protest of 64 per cent of the property owners against special assessments. *See* Olympic Boulevard Project, by Arthur Loveland, Right of Way Procedure and Land Acquisition, 1936, American Right of Way Association.

erty is deemed to have been already taken. It may develop that particular property is no longer desired for the improvement, or the award may be excessive; other reasons might be indicated. Twenty-eight jurisdictions and many methods in other States make no provision for abandonment.

If it is granted that the right to abandon proceedings is desirable, the query arises as to the stage of the proceedings beyond which abandonment should not be sanctioned. That is, there is some point in the procedure, depending upon its nature, when title vests in the condemner, and the taking becomes absolute, when the owner's right to damages accrues and the right of abandonment ceases to exist. Where the mere filing of an order of taking is sufficient to vest title in the condemner, and the right to damages in the property owner, there can be no abandonment thereafter unless there is a provision that the taking is not deemed completed until entry is made. In other methods, the States permit abandonment at various stages, i. e., before final judgment, before the verdict of the jury, before compensation has been paid, and so on.

While there are many reasons why a liberal policy of abandonment is to be desired, the property owner must be protected against the possible invasion of his rights by public authority. He may have been put to much expense in defending the action, or he may have sustained actual damage to his premises during the pendency of the proceedings. The property owner, therefore, ought to be permitted to recover his court costs, including attorney fees, and whatever actual demonstrable damage may have resulted from the action of the public body. There should be no compensation for vexation, annoyance or uncertainty to which the owner has been subjected.

Friendly, Noncontested, Summary Court Proceedings.—It is desirable to sanction proceedings to cure defective titles to property acquired for public purposes. It sometimes occurs that because of irregularities in the functioning of acquisition machinery, such as failure to make all the interested parties defendants in the action or failure to notify them all, the condemner of lands does not acquire a clear title to the property. Very few States or methods of acquisition make provision for this contingency. Thirteen States, however, have a simple and effective provision, to the effect that if title is found defective, new proceedings may be instituted without prejudice. This protects both the condemner and the owner alike. It has been suggested also that it should be permissible to institute actions against a particular parcel of land itself, rather than against the owners, so that unknown or missing parties at interest could not successfully attack the title. The Westchester County Park

Commission (New York), in its 1930 report, indicated 21 instances where title was obtained by condemnation since the ownerships of the parcels were unknown.

Moreover, while there may be no contest over the value of land appropriated, it is often impossible for public officials to reconcile so-called "paper locations" of property with existing physical monuments. It is often impossible to locate property lines because of inaccuracies and conflicts in legal descriptions and titles. There should exist some legal machinery that will facilitate a determination of these conflicts in summary fashion, i. e., actions in the nature of quiet title suits, and so on. The device of so-called friendly condemnations serving as "quiet title" actions in cases of doubtful title, was used successfully by the housing division of the Public Works Administration before the establishment of the United States Housing Authority.

An illustration of the need for such a summary device was uncovered in a survey of land acquisition practices in New York. Warren County attempted to purchase from Syracuse University certain lands for a highway improvement but difficulties arose merely because the lands had originally been donated to the University for educational purposes and now were to be dedicated to highway uses. Uncontested condemnation proceedings had to be instituted to solve the problem.

Compensation of Special Commissioners in Condemnation.—The compensation of commissioners of appraisal in condemnation proceedings is a weakness of long standing in the land acquisition machinery. Thirty-one jurisdictions make express mention of compensation to be paid members of condemnation commissions, the amounts ranging from $1 to $25 per day. It must be granted that, at the time most of these laws were enacted, the dollar had a purchasing power considerably in excess of what it has today. To obtain qualified persons willing to leave their professional activities to serve the public interest, the compensation must be commensurate with the value of the service rendered. Twenty-five dollars per day plus necessary expenses as found in the State of New York seems a fair compensation.

However, compensation per day implies that a full day's work has been done. If the commissioners meet and spend 15 minutes or half an hour at their official duties, they should be compensated, not for a full day, but only for that portion actually spent. A recent investigation in the State of New York revealed that in the condemnation of a rather simple parcel of land the appraisal commission held 56 reputed sessions, the salaries of the commissioners alone amounting to $4,200. In another instance, a condemnation com-

mission held more than 40 hearings of which about half consisted of meeting and adjourning. For each of these sessions, each of the three commissioners received $25 per day. These instances can be multiplied without end.

Court Costs in Condemnation Cases.—While little attention has been given the subject of courts' costs in condemnation cases, the issues involved deserve attention. Many methods of forcible acquisition make no provision for the payment of costs by either party to the suit; in such instances, generally, whoever incurs the costs will have to bear them. Frequently, statutes provide that the condemner shall bear the costs only if the court award is in excess of the tender made by the condemner, while some States permit the discretion of the court to prevail in the allocation of the costs of trial. Appeal costs are dealt with in a variety of ways.

In ordinary civil actions costs are awarded to the successful party but it is difficult to know who the successful party is in a condemnation suit. The owner in an eminent domain action has done no wrong and is party to a lawsuit only because he is the owner of property and has been unable to agree with the condemner as to the value of his property condemned. He is entitled to just compensation, but if he must bear court costs, he is deprived to that extent of just compensation. It seems too hard on the owner to make him bear the costs if the award is not in excess of the offer tendered him, for the rule, in effect, forces the property owner to accept the tender at the risk of paying the court costs himself, if he is not the prevailing party. The injustice of this rule has caused many juries and courts to make awards in excess of the offer, when, in many instances, the awards might otherwise have been less.

The most equitable rule of levying costs in the trial or lower court is to assess them upon the petitioner, irrespective of the amount of the award. But after the owner has once had a judicial determination of his damages, costs incurred by him upon appeal should be his own concern if he is unsuccessful; that is, in cases of appeal, the practice in ordinary civil actions should prevail. Both of these rules are found in a majority of jurisdictions. If interest and court costs are granted the property owner, there is little justification for any additional expense money, such as the 5-percent-of-the-award provision in the State of New York, being awarded to him.

FINANCING LAND ACQUISITION BY FEDERAL, STATE, AND LOCAL GOVERNMENTS

The great majority of the States traditionally permit the burden of right-of-way acquisition and financing to rest with local units of government, despite their inefficient administration and financial inability. For years, State grants-in-aid to county units of government for highway construction and more recently emergency Federal grants-in-aid were conditioned upon the local units furnishing the necessary rights-of-way at their own expense. When land was cheap and largely undeveloped, when highway improvements were relatively few in number, and when transport facilities were practically nonexistent, no particular hardship resulted. But today, rights-of-way amount to thousands of dollars on a single project and in some cases exceed the construction costs of an improvement. Associated with this phenomenon is the financial incapacity of local units of government, due in no small part to the added burdens placed upon them in recent years coupled with the apparent shrinkage in the sources of their revenues. The result is, that when the need is the greatest, the financial ability to meet this need is at its lowest ebb.

Direct State and Federal aid in the acquisition of rights-of-way is indicated. In the acquisition of lands for highway purposes, the division of financial and administrative responsibility among Federal, State, and local governments must be adapted to the needs and the respective capacities of each. For these levels of government all have common interests in the efficient expenditure of public funds. Investments in public transportation facilities should properly be regarded as capital investments from which dividends will accrue in the form of greater efficiency in the utilization of our natural resources.

As an attempted solution to the financial aspect of the right-of-way problem, the Congress in 1940 authorized the Reconstruction Finance Corporation to cooperate with the States in financing the acquisition of rights-of-way "necessary or desirable" for highway projects otherwise eligible for Federal aid.[12] No loans have yet been made under this authorization. Perhaps a more permanent solution to the problem would be the creation of a Federal land authority empowered to acquire lands necessary or desirable for highway facilities. Such lands could then be made available to State and local governments on a long-term installment-payment plan. Further investigation of the possibilities may reveal that the most effective plan likely to succeed would be a system of Federal aid to the States and cities, for right-of-way acquisition, supervised and administered by the Public Roads Administration in substantially the same manner as is the present Federal aid for highway construction. Other measures, such as excess condemnation, special assessments, the increment tax, tax exemptions, tax reversions, reclamation, and exchanges of properties may be helpful supplements in reducing

[12] Section 12, Federal Highway Act of 1940.

acquisition costs. Whatever devices are used, however, there is urgent need for some form of effective Federal financial and administrative assistance to solve the right-of-way problem.

It may be mentioned that the Federal Works Administrator has been authorized by the Defense Highway Act of 1941 to finance and acquire where necessary "new or additional lands" for flight strips, access roads, and the strategic network, for replacing roads shut off from general public use at military and naval reservations and defense-industry sites, for grade crossing eliminations on the strategic network, and for off-street parking facilities. The costs of such land acquisitions are made payable out of the appropriations authorized for the several classes of projects. Consistent with its established policy and in accordance with an alternative provision of the Act, the Public Roads Administration has channelized its land acquisition activities as much as possible through existing State and local agencies, except where it has been found that such agencies cannot act with sufficient promptness. In these latter cases, acquisition is facilitated through Federal machinery.

NATURE OF THE INTEREST ACQUIRED

In the acquisition of lands for highways, the desirability of taking a fee simple interest or merely easement rights has been subject to some controversy. Certainly, whatever interest is secured either through voluntary purchase or forcible acquisition should be clearly indicated by statute or in the proceedings. In 20 States one or more methods of land acquisition for all public purposes provide that a fee is to be taken, while other States acquire lesser estates, the easement being the most prevalent.

The condemner ordinarily can acquire only such an estate or interest as is required by the public purpose it will serve. It would be unjust to both the public and the property owner to permit the acquisition of more. While it is conceded that a fee simple estate is desirable in the case of public building sites, reservoirs, dams, and so on, some practice and authority indicate that an easement is sufficient when public land is acquired for highway and street rights-of-way. The historic concept that an easement is sufficient was based upon the needs of an era which has long passed, an era when easements were dedicated free of charge and there was little justification for a larger estate. Today, the type of controls which public welfare demands can best be exercised by means of an absolute ownership of the property involved. Moreover, there is little dispute that the public pays for a fee simple estate anyway, either in voluntary transfers or in condemnation cases, irrespective of the actual interest acquired. If thousands of dollars are expended for rights-of-way,

there is no rational reason why, if later such lands are no longer required for the purpose for which they were originally acquired, the public should not have the right to sell such lands and salvage whatever is of value, recouping themselves, in part at least, for the initial expenditure of public funds.

OFFSET OF SPECIAL BENEFITS

While general benefits should be ignored, special benefits which accrue to the property owner as a result of the improvement for which a portion of his property has been taken ought to be offset against the value of the property taken as well as against damages to the remainder. The distinction between general and special benefits is given as follows: "General benefits are those which arise from the fulfillment of the public object which justifies the taking and special benefits are those which arise from the peculiar relation of the land in question to the public improvement . . . (and) may result from physical changes in the land, from proximity to a desirable object, etc." [13] Special benefits must consist of an increased value based upon something which affects the land itself directly and proximately. "It must be founded upon something which increases the actual or useable value of the land as well as its market or saleable value and not merely something which increases the market value only." [14]

The courts have defined general and special benefits. It is said that general benefits are those which are common to the community or public at large and are conjectural and immeasurable. Special benefits are direct and peculiar to the land under consideration and are reasonably certain to result from the mere construction of an improvement.[15]

An excellent illustration of special benefits is found in California.[16] State Highway Route 26 extends easterly from Los Angeles along Aliso Street through many city lots in the City Terrace area to the

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[13] Eminent Domain, 2nd Edition (1917), Nichols, p. 765.

[14] Illustrations of special benefits: Drainage of swamps; backing up of water to form a small pond; a bridge across a river thereby connecting the farm lying on both sides of the river; the opening of a street, giving additional frontage or making a lot a corner lot; the opening of a new street or road making the property more accessible or providing ingress and egress where none was provided before; the increased value from fronting on a wider street when street has been widened; installation of sewers where there were none before; the fact that property will front on a drier street by reason of changing of the grade or paving; and improved access caused by change of grade. Increased transportation facilities themselves are not a special benefit and are shared by the community in general. *See* Benefits versus Severance, by C. R. Montgomery, Right of Way Procedure and Land Acquisition, 1936, American Right of Way Association.

[15] *Beveridge* v. *Lewis*, 137 Calif. 619; *County of Los Angeles* v. *Marblehead Land Co.*, 95 Calif. App. 602; *Collier* v. *Merced Irrigation District*, 213 Calif. 554.

[16] Acquisition of Rights of Way for Public Use and When and Where Donations Should Be Expected, by S. V. Cortelyou, Right of Way Procedure and Land Acquisition, 1936, American Right of Way Association.

great farming district of southeastern California. These lots were originally 25 feet wide and ranged from 180 feet to 216 feet in depth. In the improvement of this major artery, the State obtained 30 feet from the front of each of some 150 lots as donations, thus reducing the depth of the lots to a range of from 150 feet to 186 feet. The majority of these lots with their original depth were selling at an average price of $200 to $250 per lot; today, after completion of the improvement, these lots, less the 30-foot strip donated to the State, are being sold at $500 to $1,500 per lot.

Only special benefits are permitted to be considered in the great majority of States, but some jurisdictions, for example, New York and California, permit them to be offset only against consequential damages to the remaining portions of the land, and they cannot be deducted from the value of the lands actually taken for purposes of the improvement. While it is true that benefits are sometimes speculative in nature and difficult of precise measurement, it is good public policy to permit their deduction. For it is not just to permit a property owner adjacent to an improvement to reap special benefits from the expenditures of public funds which other members of the body politic cannot share. The owner should be placed in the same position after the forcible acquisition that he enjoyed before his property was taken; in other words, he must be made "whole" but that is all. His position need not be improved, although too often it is. This view of special benefits is conditioned, however, upon the improvements actually being made.

MARGINAL LAND ACQUISITION

Marginal land acquisition is the acquisition of road-bordering lands and properties in addition to those required for the immediate physical improvements planned for a highway, and having definite economic and protective utility in connection with the improvement. So used, the practice of marginal acquisition is not to be confused with the acquisition of an excess of land with the intention of sale or lease to recoup all or part of the cost of the improvement.

The latter device seems to have been used but sparingly in the United States, having constitutional sanction in only nine States.[17] Even in these nine States, the power is employed to only a limited extent. Courts seem to frown upon the acquisition of land by condemnation for the purpose of recoupment. On the other hand, while clear-cut decisions have yet to be made on the subject, it seems that condemnation of lands as a provision against anticipated enlargements and protection of a highway facility could well be sustained upon an

[17] California, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island, Virginia, and Wisconsin.

adequate presentation of the facts. Negotiated acquisitions of lands for the purpose of enlargement and protection are possible in any event. To date, judicial decisions have been made on collateral issues rather than on the basis of the broad principles involved.

As a technique to facilitate a full realization of the benefits of a modern motorway system, marginal land acquisition has many possibilities, most of them untried and perhaps generally unknown. Its more important advantages include: (1) Elimination or reduction of consequential damages; (2) solution of the remnant problem; (3) reduction of traffic hazards; (4) elimination of prohibitive right-of-way costs incident to future highway development; (5) aid in the establishment of freeways; (6) protection of highway investment; (7) preservation of highway appearance; (8) protection of property values; and (9) aid in the establishment of a land-use pattern. It is not believed that marginal land acquisition is a magic formula, for it has decided limitations and any wide utilization of the device must be accompanied by adequate safeguards against unwarranted invasion of the rights of property and abuse of public funds. But in the light of current difficulties in the acquisition of adequate rights-of-way for highway facilities, this technique along with others merits consideration.

Close examination of the advantages of marginal land acquisition reveals its potential usefulness. Evidence at hand indicates that it frequently costs no more, or but little more, to acquire a whole parcel than to take only a part of it and pay heavy consequential damages on the remainder. When a new street is opened or an existing one is widened, remnants are often created as a result of the disorganization of the land-use pattern, particularly of city streets, lots, and blocks. The public acquisition of these economic remnants is most desirable. It requires no extensive citation of authority for us to realize the implications of the ever-mounting toll of lives and property resulting from motor-vehicle accidents, due in no small part to the present difficulties in land acquisition. A liberal land acquisition program can do much to diminish, if not eliminate altogether, the more serious of the traffic hazards and at the same time, make adequate provision, at moderate costs, for future highway development. Under limited circumstances, it is advisable to permit the public to benefit from the increment in land value resulting from a public improvement and if possible to pay part of the cost of the improvement by the acquisition and sale or use of marginal lands. Finally, marginal acquisition permits the replanning of areas adjacent to public improvements and protects the public highway investments against economic encroachment of all sorts.

LAND USE CONTROLS

Where devices such as marginal land acquisition are not utilized, land-use controls, i. e., zoning and platting and subdivision regulation, are most useful in producing a more efficient highway transportation system. While motorways are often located to avoid small centers and built-up areas and thereby promote transport efficiency, the passing of a few years witnesses extensive ribbon development along the roadway in the form of gasoline stations, restaurants, and stands, destroying to a large extent the efficiency for which the motorway was originally designed. Unregulated subdivision of adjacent lands invites more people, more vehicles, more business, and the functional obsolescence of the highway becomes complete. Business and social development is to be encouraged most assuredly, but the pattern which such development is to follow should be carefully prescribed in the interests of a better transportation system and the general welfare. This can be accomplished through the enactment of simple, but effective, zoning, platting, and subdivision regulations.

Zoning.—Zoning is a practice established under the police power to protect the health, safety, and general welfare of the community. The power of government to zone is firmly established today.[18] An adequate zoning ordinance makes provision for an official zone map of an area, and authorizes control over height of structures, bulk, set-back, lot coverage, use, population density, and related matters by zones. Unless zoning is adequate and effective, it is little better than no regulation at all. While most jurisdictions today have some form of zoning regulation, it is generally conceded that the majority of zoning laws in the United States need overhauling.

Platting and Subdivision Regulation.—Some communities require that proposed subdivisions be approved by public authority before they are formally sanctioned. This may result in more adequate control of street and highway facilities for which provision is made. But here, as in zoning, the administration of regulations is as important as the controls themselves.

Another type of control is the deed restriction, relating to set-back, population density, and use. This is an encumbrance against the property, applied individually to each parcel or may even blanket an entire subdivision. Since restriction can be applied only by the individual owner, this method of control is not adequate for highway purposes.

[18] The constitutionality of zoning was first sustained in the case of *Euclid* v. *Ambler Realty Company*, 272 U. S. 365 (1926).

FREEWAYS OR LIMITED ACCESS HIGHWAYS

The chief distinguishing characteristic of the freeway is that it is designed to serve through traffic rather than local traffic or abutting property. Planners of freeways seek to remove obstacles to the free flow of traffic by eliminating all rights of egress and ingress from and to adjacent property, and also by limiting connections with the general system of highways and streets. Freeways may be either elevated or depressed highways, or they may be placed on the surface and the cross streets elevated or depressed or even dead-ended entirely. Limited access highways form a part of the currently proposed system of direct interregional highways, "with all necessary connections through and around cities, designed to meet the requirements of the national defense in time of war and the needs of a growing peacetime traffic of longer range."[19] Despite the apparent usefulness of limited access highways in an efficient transportation system, their potentialities are still largely unexplored and only a handful of States have made broad provision for such motorways.[20]

The courts have recognized that abutting property owners have certain rights in existing streets, of which they cannot be deprived, even for public use, without compensation. These rights are guaranteed by the "just compensation" clause of the constitution. The rights include the right of access, i. e., the right of ingress into and egress from property which abuts upon an existing street, and the right of visibility, i. e., the right to have goods which are displayed on abutting property viewed from the street, as well as the right to the flow of light and air from the street to the property. It has been said the cost of the acquisition of the rights-of-way necessary for through arteries will be great. "Unless the improvement is carefully planned in advance, with the question of damage claims in mind, the greatest element of right-of-way costs will be not the value of the property actually taken, but damages to property injuriously affected by the improvement."[21]

Elevated and depressed arteries have many advantages as well as disadvantages. Construction of an elevated roadway in an existing street generally infringes the rights of abutting owners to access to the main artery of travel and to the free flow of air and light. A depressed artery deprives abutting property of all access to the main

[19] *See* Toll Roads and Free Roads, House Document No. 272, 76th Congress, 1st Session, and Planning the Interregional Highway System, by H. E. Hilts, Public Roads, June 1941.

[20] California, Colorado, Connecticut, Louisiana, Maine, Maryland, Michigan, New Hampshire, New York, Ohio, Rhode Island, Virginia, and West Virginia.

[21] Acquisition of Rights of Way Eliminating Rights of Ingress and Egress, by C. R. Montgomery, Right of Way Procedure and Land Acquisition, 1937, American Right of Way Association.

artery. The costs involved are likely to be altogether prohibitive so that the possibility of acquiring an entirely new right-of-way for freeways looms as perhaps the only practical solution of the problem. Needed lands should be acquired in fee. Wherever great severance damages would be involved in partial takings, it will be highly desirable to acquire whole tiers of lots. "Experience has demonstrated that it would often be possible to buy a whole parcel of property, particularly improved property, for close to the amount which the condemner sometimes has to pay for the part taken and the severance to the remander."[22] The marginal land acquisition device would become most useful in the establishment of freeways.

Comparative costs of purchasing new rights-of-way and that entailed in widening existing facilities are given by Major Gilmore Clarke, consultant to the Westchester County Park Commission, New York: ". . . we can save money by building new roads for through traffic instead of widening old ones. A comparison between the cost of widening the Boston Post Road in Westchester County and that of constructing a parallel parkway a short distance away, but serving the same territory, should prove my point. In 1929, it was estimated that the cost of widening the Boston Post Road from 66 to 166 feet would have been over one million dollars a mile for the land alone, whereas to purchase lands for the Hutchinson River Parkway, having an average width of 500 feet, costs an average of $264,000 a mile. A still better example may be cited in the case of the Albany Post Road in the same county. To widen the Albany Post Road in 1929 from 66 to 166 feet was estimated to cost $792,000 per mile. Lands for the Saw Mill River Parkway, averaging 500 feet in width, and paralleling the Albany Post Road at a distance varying from one to two miles, cost at the rate of $138,600 per mile."[23]

EXCHANGE OF PROPERTY AS A LAND-ACQUISITION AID

The technique of exchanging one property for another can be used effectively to supplement other land-acquisition methods and to reduce acquisition costs. In the construction of a highway, where every parcel along the proposed route is necessary for the ultimate success of the project, the ability to exchange parcels in other areas for parcels desired for a given improvement can be particularly valuable. Advantages of exchanges are: (1) They permit the useful disposal of property in public ownership that has no public use; (2) they aid in the acquisition of needed properties along a given development—owners often do not desire to sell because of difficulties in finding new homes; (3) they permit the city to spread its land-acquisition costs over a period of years—if the city has authority to exchange property on a dollar-for-dollar basis, it can acquire properties here and there, when the market is opportune. Certainly the technique merits further investigation.

[22] C. R. Montgomery, *op. cit.*
[23] American City Magazine, January 1936, p. 56.

While a systematic method of exchange has not been used extensively in urban areas, the United States Forest Service, under the authority of the Exchange Laws of 1922 and 1925, has used the method for the past 15 years in 160 national forests with singular success. There is no reason why properties may not be traded with equal success in urban centers. The significance of the procedure is that every piece of property acquired by the government becomes potentially useful. If the city acquires a residential property through tax reversion, it may be able to effect an exchange with the owner of property abutting upon a proposed highway, to mutual advantage. Trading could even take place between the various levels of government, i. e., the HOLC or the FDIC through foreclosure may have acquired properties which are desired by municipal authorities for highway or street purposes.

RECLAMATION AS A METHOD OF LAND ACQUISITION

Reclamation may often be a successful alternative to other methods of land acquisition, and should be considered where conditions permit. Simply put, reclamation is the "creation" of land by draining, filling, and grading. Many cities have created land along the shores of rivers, lakes, or harbors. Chicago's excellent system of parks and express highways on the shore of Lake Michigan is the result of reclamation activities. Between 1934 and 1940, New York City, through its park department, has reclaimed 1,800 acres of land for parks and express roads.[24] This land has an estimated assessed valuation of $45,000,000. Boston, Massachusetts, with its reclaimed tidal marshes and flats, is another illustration. Where land is suitable for reclaiming, and the costs are not prohibitive, reclamation should not be overlooked as a method of land acquisition.

Aside from availability, it may be more economical to "create" land through reclamation than to purchase similar land in the market. The United States Housing Authority has had experience with reclamation: Two housing sites of 26 and 135 acres cost 34 cents and 53 cents per square foot, respectively, including reclamation cost, as compared with 93 cents a square foot for vacant land already improved and $1.50 and $5 a square foot for built-up blocks in the same vicinity. The Metropolitan District Commission of Boston has reclaimed 36

[24] *See* Six Years of Park Progress, 1940, by the Department of Parks, City of New York.

acres at an average cost of 24.3 cents per square foot, with contiguous property assessed at an average value of $5 per square foot. The new airport in Washington, D. C., recently built in a bend in the Potomac River has a 729-acre site, reclaimed by hydraulic fill at an average cost of less than 11 cents per square foot. It would be impossible to assemble a similar site within 10 minutes of downtown Washington for anything approaching this cost.

COORDINATION OF RIGHT-OF-WAY ACQUISITION WITH OTHER HIGHWAY ACTIVITIES

Acquisition of rights-of-way should be closely coordinated with all the other activities incidental to the construction of a highway facility. Improvements should be planned well in advance of actual need so that necessary steps incidental to construction can be undertaken efficiently. After a highway improvement has been authorized, an experienced engineer is assigned to select the best route. He may be able to do this on the basis of his own judgment, or preliminary surveys of alternate routes may be necessary for comparative purposes. A detailed survey of the selected route then follows, including the running of the center line, taking of cross sections, etc. Field inspections are made to determine suitability of the soil, and so on. Plans are then prepared from the data. Estimates of materials, labor, and costs are prepared. If Federal participation is involved, plans must be submitted to Federal authorities for approval. Once the final location is made, and the general outlines of improvements determined, actual acquirement of right-of-way may begin. Preliminary steps to this end may run parallel with the final location survey as the need for many parcels of land may be quite evident at that stage of preparation.

Since right-of-way acquisition is no longer a simple task, needed land should be secured, or at least optioned, early in the preconstruction period. The right-of-way department must work in close harmony with the engineering and planning departments at all times. Right-of-way, street and property lines must be determined, title searches made and title documents examined, ownership must be established, values studied, appraisals made, right-of-way plats must be prepared from which right-of-way is staked in the field, negotiations entered into and purchases consummated, or condemnation proceedings instituted. Too often a highway facility is delayed for years because of inefficient timing or lack of coordination of right-of-way acquisition activities with other activities of a project.[25]

[25] *See* Highway Condemnation, by R. W. Emory, Research Division, Maryland Legislative Council, 1940. (Research Report No. 8.)

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